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9  
10 STATE OF CALIFORNIA  
11  
12 NEW MOTOR VEHICLE BOARD  
13

14 In the Matter of the Protest of  
15  
16 GUARANTEE FORKLIFT, INC.  
17 DBA: GFL, INC.,

18 Protestant,

19 v.

20 CAPACITY OF TEXAS, INC.,

21 Respondent.

**Protest No. PR-2361-13**

**RESPONDENT'S PROPOSED  
FINDINGS OF FACT**

22 **I. INTRODUCTION.**

23 The parties have agreed by stipulation that the grounds for termination would be limited to  
24 the breach of the motor vehicle dealer agreement. The record before the Board clearly sets forth a  
25 breach of the agreement, tacitly as well as the implied covenants within the contract to support  
26 good cause for the termination of Guarantee Fork Lift, Inc. ("GFL") as a franchise dealer of  
27 Capacity of Texas, Inc. ("Capacity"). The time and expense to develop the Capacity Online Parts  
28 Ordering system as well as the precautions taken by Capacity to protect the integrity and the  
competitive advantage that the system provided to Capacity and Capacity dealers qualify the

1 same as a trade secret. The misuse of the system by GFL cannot be characterized as anything  
2 other than a breach of both the agreement and the terms and conditions accepted for use of that  
3 system by GFL. Based upon the acts of GFL, the Board finds support for the findings set forth  
4 herein and the determination that there is good cause for the termination of the franchise  
5 agreement.  
6

## 7 **II. PROCEDURAL HISTORY.**

8 1. By letter dated February 1, 2013, Respondent, Capacity, provided notice to GFL of  
9 its intent to terminate the franchise agreement. (Joint Exhibit 3, paragraph 1). GFL timely filed a  
10 protest to the termination.  
11

12 2. That matter was called to hearing on December 11, 2013 and was completed that  
13 date. There was testimony from four live witnesses and 8 exhibits admitted into the record. The  
14 testimony of four witnesses was submitted through deposition designations.  
15

### 16 **PARTIES AND COUNSEL**

17 3. Protestant is an authorized Capacity dealer located at 689 4<sup>th</sup> Street, Oakland,  
18 California. Protestant is a "franchisee" within the meaning of Sections 331.1 and 3062(a)(1) of  
19 the California Vehicle Code.

20 4. Protestant is represented by the Law Offices of Michael J. Flanagan, by Gavin  
21 Hughes, Esq., 227 Fair Oaks Boulevard, Suite 450, Sacramento, California.

22 5. Respondent is a "franchisor" within the meaning of Sections 331.2 and 3062(a)(1)  
23 of the California Vehicle Code.

24 6. Respondent is represented by Waits, Brownlee, Berger & Dewoskin, by Rita  
25 Hoop, Esq. and Timothy Brownlee, Esq., 401 W. 89<sup>th</sup> Street, Kansas City, Missouri.  
26 Additionally, Baker & Hostetler, LLP, 600 Anton Boulevard, Suite 900, Costa Mesa, California,  
27 is local counsel for Respondent.  
28

1                                    PROTESTANT'S WITNESSES AT THE MERITS HEARING

2                    7.        Protestant did not call any witnesses.

3                                    RESPONDENT'S WITNESSES AT THE MERITS HEARING

4                    8.        Respondent called the following witnesses: Denis Rosen, owner and operator of  
5 GFL, Inc.; Jerry Looney, Vice President of Capacity of Texas, Inc.; Steve Mehrens, former  
6 employee of GFL; and Dawn Herbert, Service and Aftermarket Parts Operations Manager for  
7 Capacity Trucks.  
8

9                                    DEPOSITION TESTIMONY AT THE MERITS HEARING

10                  9.        Deposition excerpts of the following deponents were admitted into evidence:  
11 Melissa Childers, Cliff Huff, Virginia Franklin and Michael Yates, all of whom are employed  
12 with Capacity.  
13

14        **III. ISSUE PRESENTED.**

15                  10. The following issue is presented by this protest: did GFL breach its agreement with  
16 Capacity by failing to protect access to a proprietary parts ordering system?

17                  11. The obligation to protect and utilize tools provided by Capacity to dealers, including  
18 the parts ordering system, in a manner that protected the integrity of that system was both an  
19 explicit obligation of GFL as well as an implied obligation. The failure of GFL to meet its  
20 obligations to Capacity constitutes a breach of its agreement. Therefore Capacity has sustained its  
21 burden of proving good cause for the termination of GFL as a capacity dealer.  
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23                  12. The parties have agreed that the only grounds for termination of the agreement are  
24 based on a breach of the contract between Capacity and GFL.  
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Protestant's Contentions

13. Protestant contends: that Capacity has not established a breach of a term or condition of the franchise agreement; that GFL's breach is de minimus; that GFL has not breached the agreement.

Respondent's Contentions

14. Respondent contends: that providing the access password to the online parts ordering system was a material breach of GFL's obligation to Capacity under the franchise agreement, the terms and condition accepted by the user of the online parts ordering system application and a violation of California and federal law.

**IV. PROPOSED FINDINGS OF FACT**

15. The Principal, President and sole shareholder of GFL is Denise Rosen – Kendrick. (J. Exh. 4)

16. Stephen Mehrens was an employee of GFL for approximately 13 years and his employment terminated on October 22, 2012. (J. Exh. 4)

17. Stephen Mehrens became employed by Mid-Pacific Industries (Mid-Pac) which is an authorized dealer of Kalmar/Ottawa products and who is Capacity's largest competitor. . (RT 22:19-25; 23:1; 57:3-5; 81:13-25; 112:20-25; 113:5-10)

18. Mid-PAC provides repair services for Kalmar/Ottawa, Capacity, and other brands of terminal trucks. (RT 156:19-21; 188:12-18; Resp. Ex. 116 30:13-15; 53:6-9)

**The Capacity Online Parts Ordering System**

19. The Capacity online parts ordering system (COPOS is a website where Capacity Dealers can login, do research by VIN number, and find a breakdown of each truck with that their customer may have. (RT 197:15-24)

1           20. Capacity Dealers can drill down into a bill of material that tells them what  
2 components were used on the truck and how many are required. The Dealer can place orders  
3 directly from those bills of material and look up major component serial numbers. (RT 197:15-  
4 24)

6           21. COPOS is a huge database for Capacity parts. (RT 197:15-25)

7           22. The COPOS online system allows the user to access and research parts that are  
8 needed on the Capacity yard trucks. COPOS also allows the user to get engine serial number and  
9 transmission serial number. (RT 35:7-14) The online system allows Capacity dealers access to  
10 information independently as well as give them real-time inventory and real-time pricing. (RT  
11 88:18-20)

12           23. The COPOS system provides Capacity dealers access to information about every  
13 truck built by Capacity in the last 15 years. (RT 88: 21; 89:1)

15           **The Information In COPOS Is Not Known Outside The Capacity Business**

16           24. Only authorized Capacity Dealers have access to COPOS. (RT 89:13-16) Before a  
17 user is given access they go through training which includes specific instruction about  
18 responsibilities of the Dealer principal as to passwords and user IDs. (RT 89:15-22)

19           25. The Protestant confirmed that Capacity wants to keep access to the COPOS online  
20 system a secret when specifically asked "Would you agree with me that Capacity wants to keep  
21 the access to that online system a secret? They don't want everybody to have access to it?"  
22 Protestant responded "Oh, definitely." (RT 36:22-25)

23           26. Capacity Dealers do not want non-Capacity dealers to have access to the COPOS  
24 online system. (RT37:7-10) When a dealer wants access to the system they would call in and as  
25 long as they have an active account with Capacity and they have gone through the credit  
26  
27  
28

1 application process we would assign them a user profile with a password and provide training on  
2 the web site. (RT 200:16-22)

3  
4 27. Capacity goes to extensive lengths to keep the content of the system confidential and  
5 limit access to authorized users that have been granted a password by Capacity. (RT 87:7-11)The  
6 system is not accessible to the general public or competitors. (RT 36:7-15; 92:10-19)

7 28. Each time an authorized user with a password accesses the system a confidentially  
8 notice appears and the user must agree to such. There is no other way to access the system. (RT  
9 46:19- 47:18; J-Exhibit 2) the opening screen confidentiality notice is contained fully at Exhibit  
10 J2.  
11

12 **The Capacity Online System Gives Capacity Dealers A Competitive Edge**

13 29. The Capacity Online Parts Ordering System (COPOS) gives Capacity Dealers a  
14 competitive edge. (Resp. Ex. R116 36:10-25; 37:1)

15 30. The COPOS web site is a critical improvement to Capacity and a site such as this is  
16 not offered by any of Capacity competitors. (RT 101:6-17) The COPOS gives Capacity Dealers a  
17 step above the competitors in being able to service Capacity easier access to servicing its trucks  
18 than ever before. (RT 101:6-17) It is important to Capacity as a manufacturer to be able to  
19 provide these types of values to its dealers as it tries to build the dealer network. (RT 101:6-17)  
20

21 31. Mid Pac is a competitor to GFL and all other Capacity dealers because owners of  
22 Capacity trucks can get their trucks serviced at Mid Pac or a Capacity dealer. (Resp. Ex. R116  
23 30:13-15) Capacity dealers have a competitive advantage over non-Capacity dealers (i.e. Mid  
24 Pac) because they have access to the COPOS. (RT 37:11-14) The online ordering and research  
25 system allows a Capacity dealer to conduct research more efficiently, determine needs of  
26 customers that own custom built vehicles, respond to customer requests more quickly, accurately  
27 analyze and compare pricing, and place orders and conduct research 24 hours per day. (RT  
28

1 197:15-24; RT 198: 2-14) Without access to the online ordering and research system, a purchaser  
2 would have to contact a customer service representative at Capacity during working hours and  
3 request that the CSR manually research the needs of the customer over the phone. (RT 198:2-7)  
4

5 32. If a non-Capacity dealer gained unauthorized access to the online ordering and  
6 research system that would diminish the competitive advantages belonging exclusively to  
7 Capacity dealers. (RT 36:16-25; R37:7-14)  
8

9 33. It is undisputed by the Protestant that the Capacity Online System gives Capacity  
10 dealers a competitive edge, is valuable, and Capacity Dealers do not want their competitors to  
11 have access. (RT 36:16-25, 37:7-14; 91:16-25; 92:1; 92:2-9; 113:20-25; Resp. Ex. R115 50:10-  
12 25)  
13

#### **Capacity Limits And Protects Access to the Online System**

14 34. In order to access the information on the COPOS system a dealer must enter a user ID  
15 and a password. (RT 89:13-25) The confidential nature of the information on the website is  
16 emphasized and further protected by requiring authorized users to accept the "Terms and  
17 Conditions" page each time they log into the system. (RT 46:4-8; 47:9-12; 48:13-25; 51:21-24;  
18 86: 3-11) The Terms and Conditions page requires the user to acknowledge that "The  
19 information and capabilities provided on this website are provided solely to assist Capacity of  
20 Texas, Inc. ("CAPACITY") and its AUTHORIZED DELAERS AND CUSTOMERS, in the  
21 process of identifying and ordering parts from CAPACITY. The information provided is the sole  
22 property of CAPACITY and is considered confidential by and are trade secrets of, CAPACITY."  
23 (J-EXHIBIT #2)  
24  
25

#### **Capacity Spent Upwards Of \$500,000 In The Development Of COPOS**

26 35. Capacity launched the roll out of the COPOS online system in 2008 after an eighteen  
27 (18) month to 2 year development process. (RT 87:12-13)  
28

1           36. The cost of develop was approximately one half million dollars. (RT 87:15-25)  
2           Development costs were spent on software development, converting Capacity's parts data to  
3           something that was easily used on the web and other outside consultants.(RT 87: 24-25; 88:1-4)  
4           The software development and implementation was performed by GGS and other third party  
5           consultants. (RT 87:12-25; 88: 1-4) GGS also provides ongoing maintenance and service for the  
6           system. Capacity has spent an additional \$323,699.64 in maintenance and updating costs to GGS  
7           between April 30, 2009 (over the rollout) and August 31, 2013. Respondent's exhibit #113  
8           shows payments made by Capacity to GGS related to the COPOS system. (RT 94:20-25; 95:1-4;  
9           Resp. Ex. R113)

12           **It Would Be Expensive And Difficult For An Outside Entity To Develop And Maintain**  
13           **Current Product Information Given The Complexity And Uniqueness Of Each Capacity**  
14           **Product**

14           37. Capacity trucks are custom built for each customer. (RT 35:15-18; Resp. Ex 115  
15           52:5-9) The parts for each custom built Capacity truck are specific to that Vehicle Identification  
16           Number. (RT 35:19-25; 36:1-2; 79:8-9) When an order is placed by a user, the Online System is  
17           updated immediately so all inventory and availability is current for authorized Capacity Dealers.  
18           (RT 198:22-25; 199:1-2)

20           38. Protestant admits that COPOS is a trade secret. (Resp. Ex. R115 50:20-25; 51:1-4;  
21           90:18-25)

22           39. Protestant acknowledges that it is the Dealer's responsibility to protect the COPOS  
23           system as a trade secret and to limit the use of passwords. (Resp. Ex. R115 99:11-16)

26           **Steve Mehrens Accessed The Capacity Online System After He Left GFL Without**  
27           **Authorization.**



1           40. The Protestant acknowledges that Steve Mehrens accessed the Capacity Online  
2 System when he worked at Mid Pacific using GFL's user ID and password. (RT 39:12-21) Steve  
3 Mehrens admitted that he accessed the Capacity Online System while he worked at Mid Pacific.  
4 He made this admission to Phillip Ford, former President of Capacity Trucks. (RT 173:1-3 Resp.  
5 Ex. R116 69:23-25) He made this admission a telephone conversation with Rita Hoop, attorney  
6 for Capacity Trucks. (RT 173: 24-25; 174:1-2) He made this admission in his deposition (RT  
7 174:3-4; Resp. Ex. R116 96:18-20) and he made this same admission in the Merits Hearing. (RT  
8 174:5-6)

10           41. Steve Mehrens accessed the COPOS website while he worked for a non-Capacity  
11 dealer for the purposes of helping Mid-Pac customer, GFL customers, and to conduct research.  
12 (Resp. Ex. R116 31:5-20; 46:1-19)

14           42. If Steve Mehrens would not have had unauthorized access to COPOS to research  
15 Capacity parts while he worked at Mid-Pac, he would have gone through a Capacity Dealer to get  
16 information and order parts, thereby giving the business to a Capacity Dealer. (Resp. Ex. R116  
17 32:11-22)

18           43. Exhibit R-103 is a log of each time the user IDs of SMehrens and smehren logged in  
19 and what they researched. (RT 211: 21-25; 212:1; Resp. Ex R103) The dates on Respondent  
20 Exhibit R103 span November 21, 2012 until January 21, 2013. (RT 163:25; 164:1-10) The  
21 COPOS system was accessed 39 times during that time span. (Resp. Ex R103)

23           44. The password associated with the SMehren and smehren account was changed to  
24 "Darlene" in November 2012. (RT 137:5-25; 138:1-5; 211:1-20) Steve Mehrens worked at Mid  
25 Pacific from November 1, 2012 until February 4, 2013. (RT 171:6-8) Steve Mehrens confirmed  
26 that he made at least some of the logins listed on Exhibit R-103 all of which occurred during a  
27 time when he worked at Mid Pacific. (RT 163:21-25; 164:1 – 23; Resp. Ex. R96:18-20)

1 45. The Protestant admits that Steve Mehrens definitely accessed the COPOS online  
2 system while he was employed at Mid-Pac and no longer authorized to do so as an employee of  
3 GFL. (RT 39:12-21) The only way that he could have gained access to the COPOS system would  
4 be to use the "Darlene" password created by Denise Rosen in November 2012. (RT 39:12-24)  
5

6 **Denise Rosen Gave The New Password To The Capacity Online System To Steve Mehrens**

7 46. Steve Mehrens received the password to the COPOS website from Denise Rosen after  
8 he left his employment at GFL and during a time that he worked for a non-Capacity truck parts  
9 dealer. (Resp. Ex. R116 38:20-25;39:1-5)  
10

11 47. Steve Mehrens received a text from a telephone identified as "Denise" on November  
12 21, 2012 that gave him the new password of "Darlene". (Resp. Ex. R101, RT152:6-25; 153 :1-  
13 19)

14 48. Steve Mehrens created the contact in his phone for Denise Rosen and identified that  
15 contact as "Denise". (RT 138:21-25; 139:1-11; 144:10-11) Steve Mehrens had in the past talked  
16 to Denise Rosen and received texts from Denise Rosen and those incoming communications were  
17 shown as "Denise" in his telephone contact identifier. (RT 138:21-25; 139:1-11) When Steven  
18 Mehrens would receive a text from Denise Rosen in the past it would show up on his telephone as  
19 "Denise" was the sender. (RT 138:21-25; 139:1-11)  
20

21 49. Steve Mehrens received the text that gave the new password of "Darlene" from  
22 Denise Rosen's telephone. (R-EXHIBIT 101; R-EXHIBIT 102; RT 140:17-24)

23 50. The password of "Darlene" was created by Denise Rosen in November 2012 and was  
24 the password on all three GFL accounts that would allow access to COPOS. (RT 345:1-6; 32:16-  
25 22) Steve Mehrens used the GFL user ID and new password of "Darlene" to access the COPOS  
26 system while he was employed at Mid-Pac.  
27  
28

1           51. Steve Mehrens accessed the Capacity Online System while he worked at Mid Pacific  
2 for the purposes of helping Mid Pac customers (RT 188:12-18), Ottawa customers (RT 187:19-  
3 20), and Denise Rosen at GFL (RT 162:13-19).  
4

5           52. Respondent's Exhibit #102 clearly shows that the sender of the text to Steve Mehrens  
6 offering to send the password to the COPOS system was with "Bill at the hospital" on November  
7 21, 2012. (RT 151:7-18; Resp. Ex. R102) Ms. Rosen admitted that on November 21, 2012 she  
8 was at the hospital in Sonora because her Grandmother was a patient and her Grandmother's  
9 husband's name is Bill. (RT 44:13-18)  
10

11           53. Ms. Rosen claims that three other people had access to the new password of  
12 "Darlene" and could have had possession of her mobile telephone and texted the new password to  
13 Steven Mehrens. (RT 39:25; 40:1-2; 61:18-25; 62:1-12) The people she pointed to were Artie  
14 Kendrick, Deanna Rosen, and Carrie Jantzen. (RT 39:25; 40:1-2;) All of these people were  
15 agents of GFL and performing tasks on behalf of GFL and would have gained access to the  
16 password only as a result of "helping out at GFL". (RT 39:6-17; 44:7-9; 62:9-12; 40:12-25; Resp.  
17 Ex R115 21:22-25; 22:1-4) Ms. Rosen then contradicted herself and specifically stated that Artie  
18 Kendrick did not give the password to Steve Mehrens (RT 40:7-11) and Deanna Rosen did not  
19 give the password to Steve Mehrens. (RT 41:10-12) So that leaves only Carrie Jantzen.  
20

21           54. Carrie Jantzen was an agent of GFL. (Resp. Ex. R116 33:2-9; Resp. Ex. R116 39:20-  
22 25;40:5-20;41:11-20; 93:4-25; Resp. Ex. R115 90:20-25; 91:1-6; 31:2-10; 69:6-16)  
23

24           55. In Ms. Rosen's attempt to point the finger at Carrie Jantzen she ignored the fact that  
25 the text that included the password also included verification that the sender was at the hospital  
26 with "Bill" which happens to be the name of Ms. Rosen's grandmother's husband. (RT 44:13-18)  
27 In Ms. Rosen's attempt to point the finger at Carrie Jantzen she also ignored the fact that Carrie  
28 Jantzen was working at GFL and was an agent of GFL and therefore the dissemination of the

1 Capacity trade secret is still on GFL. Further evidence that Carrie Jantzen did not send the text  
2 with the password from Denise Rosen's phone is that Ms. Rosen said she never gave the  
3 password to Carrie Jantzen (RT 42:15-21) and she did not think Carrie Jantzen had ever accessed  
4 the Capacity online system. (RT 43:15-21)  
5

6 **Ongoing Deception by the Protestant/Principal of Dealership**

7 56. Denise Rosen, Principal of GFL, admitted that she lied to Capacity about Steve  
8 Mehrens being on medical leave. (RT 19:15-21; 20:20-25; 21:1-9; 22:6-13) Steve Mehrens told  
9 Denise Rosen when he gave notice of his resignation from GFL that he was going to work for  
10 Mid-Pac at the end October 2012. (Resp. Ex. R116 25:17-25)  
11

12 57. Steve Mehrens lied to Capacity while he was still employed at GFL by saying that he  
13 was going on medical leave rather than admit that he was going to work for non-Capacity dealer.  
14 (Resp. Ex. R116 49:24-25; 50:1-14.)

15 58. He told this lie in order to help GFL (Resp. Ex. R116 50:5-14)

16 59. Denise Rosen knew that she was deceiving Capacity about Steve Mehrens being on  
17 medical leave for her own benefit and to the detriment of Capacity. (RT 22:6-18; Resp. Ex. R116  
18 99:13-25; 51:9-13)  
19

20 **V. CONCLUSIONS**

21 **EXTENT OF FRANCHISEE'S FAILURE TO COMPLY WITH THE TERMS OF THE**  
22 **FRANCHISE [VEHICLE CODE SECTION 3063(g)]**

23 60. Capacity has established that GFL has failed to comply with the terms of its Franchise  
24 and further that the breach of that franchise was both material and substantial. Respondent has  
25 established good cause for termination of the franchise agreement.  
26

27 **VI. DETERMINATION OF ISSUES**

1           61. Respondent Capacity has sustained its burden of proof of establishing good cause for  
2 the termination of the franchise agreement with GFL. [Section 3063(g)] Protestant's Protest is  
3 hereby overruled.  
4

5  
6           Respondent offers the preceding proposed findings for acceptance by the Board in support  
7 of its decision to overrule the Protest.  
8  
9  
10

11 Dated: January 31 2014

WAITS, BROWNLEE, BERGER &  
DEWOSKIN

12  
13 By: 

Timothy R. Brownlee

Rita L. Hoop

Maurice Sanchez – BakerHostetler LLP

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16 Attorneys for Respondent  
CAPACITY OF TEXAS, INC.  
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1 **PROOF OF SERVICE**

2 I am employed in Jackson County, Missouri. I am over the age of eighteen years  
3 and not a party to the within entitled action. My business address is 401 W. 89<sup>th</sup> Street,  
4 Kansas City, MO 64114. I am readily familiar with this firm's practice for collection and  
5 processing of correspondence for mailing with the United States Postal Service. On  
6 January 31, 2014, I SERVED a true and correct copy of the within document(s):  
7

8 **RESPONDENT CAPACITY OF TEXAS, INC.'S PROPOSED FINDINGS**  
9 **OF FACT**

- 10 ☐ by transmitting via facsimile the document(s) listed above to the fax  
11 number(s) set forth below on this date before 5:00 p.m. and the  
12 transmission was reported as complete and without error.
- 13 ☒ by placing the document(s) listed above in a sealed envelope with postage  
14 thereon fully prepaid, in the United States mail at Kansas City, Missouri  
15 addressed as set forth below.
- 16 ☐ by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope  
17 and affixing a pre-paid air bill, and causing the envelope to be delivered to  
18 a \_\_\_\_\_ agent for delivery.
- 19 ☐ following ordinary business practices, the envelope was sealed and placed  
20 for collection by Overnite Express on this date, and would, in the ordinary  
21 course of business, be retrieved by Overnite Express for overnight delivery  
22 on this date.
- 23 ☐ by personally delivering the document(s) listed above to the person(s) at  
24 the address(es) set forth below.
- 25 ☒ by transmitting via electronic mail the document(s) listed above to the e-  
26 mail address(es) set forth below on this date before 5:00 p.m. and the  
27 transmission was reported as complete and without error.

24 Michael J. Flanagan, Esq.  
25 Gavin M. Hughes, Esq.  
26 LAW OFFICES OF MICHAEL J. FLANAGAN  
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### RESPONDENT'S PROPOSED FINDINGS OF FACT

LAW OFFICES OF MACHAEL J. FLANAGAN  
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Sacramento, CA 95825

I am also readily familiar with the firm's practice of transmitting via electronic mail and processing correspondence vial email. Under that practice it would be emailed and the transmission would be reported as complete and with out error.

Executed on this 31st day of January, 2014, at Kansas City, Missouri.

  
Robin Thomas

RESPONDENT'S PROPOSED FINDINGS OF FACT